the author of the clause in its final form,[8] and by other publicists [9] of the time in a sense broad enough to include direct democracy. The same thing is true of the use of the corresponding French words *république* and *républicain* by Montesquieu [10] and apparently by Rousseau,[11] the writings of both of whom had a great influence on American political thought of that period. The political party which advocated keeping the government as close to the people as possible was called, shortly after the formation of the Constitution, the Republican Party.[12] On the other hand, Madison defines a republic as "a government in which the scheme of representation takes place," and contrasts it with a pure democracy.[13] Discussion of the clause under consideration in the constitutional convention indicates that it was directed against insurrection, invasion, and monarchical forms.[14]

The state governments in existence in 1787 must be taken as examples of the republican form, in the sense in which that phrase is used in the Constitution.[15] In spite of the fact that the referendum appears in the formation of some of the state constitutions [16] and in spite of the existence of the New England town government,[17] so close a student of political science as Hamilton believed that the state governments were then wholly representative.[18] Another of the authors of the Federalist, however, points out that the Constitution does not forbid the substitution of other republican forms for those then existing.[19] It seems, on the whole, that "republican" in the Constitution is ambiguous, and that a positive construction that it had a meaning so narrow as to exclude direct legislation cannot be supported.

But even if "Republican Form of Government" does mean representative government, it might well be contended that a slight tincture of direct democracy would not destroy the representative character of a state government.[20] Furthermore, it is probable that the enforcement of the constitutional guaranty is a political question for Congress and the President rather than for the judiciary.[21]

THE CUSTODY OF CHILDREN AND CONFLICT OF LAWS. — The commendable tendency to make the welfare of the children the primary consideration in questions concerning their custody has caused considerable

[8] See 2 GILPIN, MADISON PAPERS, 1141.

[9] See 1 MADISON, LETTERS AND OTHER WRITINGS, 350; 4 *ibid.* 467; 10 FORD, WRITINGS OF THOMAS JEFFERSON, 28.

[10] See L'ESPRIT DES LOIS, liv. 2, ch. 1, 2.

[11] See CONTRAT SOCIAL, liv. 3, ch. 4.

[12] See HART, FORMATION OF THE UNION, 155, 164.

[13] See THE FEDERALIST, No. 10.

[14] See 2 GILPIN, MADISON PAPERS, 1139–1141.

[15] See Minor *v.* Happersett, 21 Wall. (U. S.) 162.

[16] See LOBINGIER, THE PEOPLE'S LAW, 163–187.

[17] For an argument from this that the guaranty has no application to local government, see Eckerson *v.* Des Moines, 137 Ia. 452.

[18] See THE FEDERALIST, No. 63.

[19] See *ibid.* No. 43, § 6 (Madison).

[20] See State *v.* Pacific States Telephone & Telegraph Co., 53 Ore. 162; Kadderly *v.* City of Portland, 44 Ore. 118.

[21] See Taylor *v.* Beckham, 178 U. S. 548, 578; Luther *v.* Borden, 7 How. (U. S.) 1, 42.

confusion in the rules which govern jurisdiction of this matter. Theoretically, it would seem that the court of the child's domicile should have power to determine its custody, since that sovereign is especially interested in the child's welfare.[1] In fact, however, other courts often assume to decide this question,[2] and owing to the rules which govern an infant's domicile such action is usually entirely proper from the point of view of the child's interests. An unemancipated infant has no power to change his own domicile,[3] which follows that of his natural guardian, the father while living, and on his death, the mother.[4] Therefore if an infant is living apart from his father, the court at his actual residence may be much more competent to designate the person entitled to his custody than the court at his legal domicile. Similarly, where a guardian is appointed at the domicile of an infant who with the guardian's consent is taken to another state where a second guardian is appointed, the first guardian, though his position must be recognized, has no absolute right to the custody of the child.[5] Consequently it would seem that the only way by which a court can retain effective control over an infant for whom it has appointed a guardian, is to forbid his being taken beyond its jurisdiction.[6]

Under these conditions, though the interests of the infant may be well served, some troublesome questions arise as to the position of the guardian. Since a guardian appointed by the court derives all his power from the court, he cannot change his ward's domicile to a place beyond its jurisdiction.[7] If he takes his ward out of the jurisdiction he does not thereby escape his obligations to the court which appointed him, but is still its officer and subject to its commands.[8] But the court which has jurisdiction over the place to which the infant has been taken may see fit to decide the question of his custody for itself. If it also appoints the same guardian, and the two courts make inconsistent orders, the problem is presented — which must he obey?

Similar questions may arise when the custody of the children has been awarded to the mother after a decree of divorce. A court granting a divorce has power, usually given by statute, to make such an award,[9] though not if the children and one of the parents are beyond its jurisdiction.[10] It also, and quite properly, may usually modify the award if

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[1] See *In re* Hubbard, 82 N. Y. 90; SCHOULER, DOMESTIC RELATIONS, § 303.

[2] Johnstone *v.* Beattie, 10 Cl. & F. 42; *Re* Willoughby, 30 Ch. D. 324, where the English court appointed a guardian though the child was domiciled with its mother in France, and had no property in England.

[3] Metcalf *v.* Lowther's Executrix, 56 Ala. 312.

[4] Kennedy *v.* Ryall, 67 N. Y. 379; Dedham *v.* Natick, 16 Mass. 134. See Lamar *v.* Micou, 112 U. S. 452.

[5] Woodworth *v.* Spring, 4 Allen (Mass.) 321. See STORY, CONFLICT OF LAWS, § 499. *Contra*, Nugent *v.* Vetzera, L. R. 2 Eq. 704, where it was held that a foreign guardian, being recognized as such in England, had the absolute right to the custody of the child by English law.

[6] See Miner *v.* Miner, 11 Ill. 43; Jaob *v.* Sheets, 99 Ind. 328. But see Campbell *v.* Campbell, 37 Wis. 206.

[7] Shorter *v.* Williams, 74 Ga. 539; Marheineke *v.* Grothaus, 72 Mo. 204. See Douglas *v.* Douglas, L. R. 12 Eq. 617, 625.

[8] Shorter *v.* Williams, *supra*.

[9] Hoffman *v.* Hoffman, 15 Oh. St. 427; Young *v.* McIntire, 156 Mass. 27.

[10] De la Montanya *v.* De la Montanya, 112 Cal. 101; Kline *v.* Kline, 57 Ia. 386. See 10 HARV. L. REV. 131.

circumstances subsequently require it.[11] It was recently decided that where the decree gave the custody of the children to the mother, a modification of it was proper after she had lived with them for several years in a foreign country, intending to make it her home. *Morrill* v. *Morrill*, 77 Atl. 1 (Conn.). The mother in such a case is in the position of a guardian appointed by the court, over whom it has a continuing jurisdiction.[12] In some cases the exercise of this jurisdiction may be proper even though another court is able to act in the matter. But if another court has taken jurisdiction, it would seem that the first should not interfere; for, owing to the children's absence, it is no longer the best judge of their welfare, and has no power to make its orders effective.[13] Since the father, as natural guardian, can change the legal domicile of his children,[14] it is submitted that if he is given their custody and takes them beyond the jurisdiction of the court granting the divorce, it should have even greater hesitation in interfering than where custody is given to the mother.

ESTATES TAIL IN THE UNITED STATES. — Though the Statute *De Donis* seems out of harmony with American institutions,[1] estates tail were introduced into this country[2] and seem to have been recognized in most jurisdictions[3] till done away with by statute. Fines and recoveries naturally came with the estate.[4] Commonly these methods of barring the entail have been expressly abolished or supplanted by simpler legislative processes,[5] with the probable result that legal estates tail can everywhere easily be barred. On the other hand, it is uncertain whether the tenants of equitable estates tail ever had power to dispose of a fee simple. After fluctuating decisions it was at length established in England that they could do so by such a conveyance as would have been effective had the estate been at law.[6] Since equitable estates tail arose only through analogy to the legal estates, our courts should, it seems, follow this consistent principle, but the only case found in which the point was presented has not done so.[7]

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[11] Campbell *v.* Campbell, *supra;* Harvey *v.* Lane, 66 Me. 536. But see Sullivan *v.* Learned, 49 Ind. 252.

[12] Stanton *v.* Willson, 3 Day (Conn.) 37; Stetson *v.* Stetson, 80 Me. 483. The father is still liable for the support of the children. Pretzinger *v.* Pretzinger, 45 Oh. St. 452. *Contra*, Brow *v.* Brightman, 136 Mass. 187.

[13] See Stuart *v.* Bute, 9 H. L. C. 439, where it was said that although the Scotch and English courts both had jurisdiction, they should act in harmony.

[14] See note 4.

[1] Pierson *v.* Lane, 60 Ia. 60.

[2] 4 KENT'S COMMENTARIES, 14.

[3] The Statute *De Donis* seems never to have been in force in Iowa. Pierson *v.* Lane, *supra.*

[4] Dudley *v.* Sumner, 5 Mass. 438; see Carter *v.* Tyler, 1 Call (Va.) 165, 182.

[5] But a Delaware statute makes it perhaps still possible to employ these old methods. DELAWARE REV. STAT. (1893) 630. The existence of fines and recoveries is doubtful when the only relevant legislation is the abolition of estates tail or the destruction of all forms of action by the enactment of a code of procedure.

[6] North *v.* Champernoon, 2 Ch. Ca. 78; Kirkham *v.* Smith, Ambler 518.

[7] The principal case.